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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-39

HISPANIC COALITION ON REAPPORTIONMENT, et al.,
Appellants

v.

LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell move to affirm on the ground that the questions presented are so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE

Appellees are in substantial agreement with Appellants' chronology of the events which occurred in the reapportionment process. Appellees note as well that the preliminary plan proposed by the Legislative Reapportionment Commission contained no House district with a Hispanic population greater than fifteen percent [J.S. App. 7]. After extensive public comment on the preliminary plan, the Commission issued a final plan containing a House district, the 180th, with a Hispanic population of forty percent [J.S. App. 8]. This final plan is now the law of the Commonwealth of Pennsylvania.

ARGUMENT

Appellees, the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell, filed in the court below a motion to dismiss for improper joinder. The court granted the motion on the grounds that these parties are without authority or power to effect any of the relief sought by the Appellants [J.S.App. 13]. Appellants state that they do not contest, on appeal, the court's ruling that these Appellees were improperly joined as parties [J.S. 9]. Thus, the only issue which will be addressed in this motion to affirm is the extent to which Representative O'Donnell may assert his legislative privilege to avoid questioning during discovery and trial about his role in the reapportionment process.[1]

Appellants argue that the court below erred in applying legislative privilege to effectively bar the gathering of evidence necessary for a judicial determination in this voting rights case [J.S. i, 17]. In particular, they contend that the court below should not have granted a protective order which restricted the pretrial deposition of Appellee O'Donnell on the basis of his legislative privilege. They also argue that the direct examination of Appellee O'Donnell at trial was improperly limited by the court's construction of legislative privilege.

It should be noted at the outset that the protective order to which Appellants refer was issued in response to a motion filed by Appellee O'Donnell pursuant to Rule

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1. Appellee the Legislative Reapportionment Commission has also filed a motion to affirm the judgment of the court below, addressing the issue of the applicability of legislative privilege to Commission members. In addition, Appellee William R. Davis, Secretary of the Commonwealth of Pennsylvania, has also filed a motion to affirm the judgment of the court below. Appellee Davis' motion addresses both the court's rulings on the legislative privilege question and the ruling on the merits of Appellants' claims.

26(c) of the Federal Rules of Civil Procedure. O'Donnell's motion sought to prevent his deposition on the ground that his legislative privilege provided absolute testimonial immunity. A protective order was granted to O'Donnell by the court, but it was clearly limited in scope, as is made evident in the court's bench opinion, issued after argument on the motions:

> As far as Legislator O'Donnell is concerned, in respect to any of his legislative duties, purely legislative duties, he is entitled to the benefit of the immunity as well. . . . However, to the extent to which what is being sought from Mr. O'Donnell is purely political, having nothing to do with his status as a legislator or his legislative duties, assigned duties in the legislature, to that extent, it would seem he is not entitled to protection; he is not immune. That is to say, to the extent to which the deposition in good faith would inquire only into private, that is, activities and functions as a private person, or that are strictly political, that is, associated with political status, they are not entitled to the benefit of immunity.
>
> But he is entitled to the benefit of the immunity, the extent to which inquiry would be made as to any legislative function or role that he has. . . . For example, the court will not allow inquiry as to any legislative function that Mr. O'Donnell would have, that is, any committee duty in the legislature or any assignments he is fulfilling as a legislator. But his activities or his contact with or relationship with the City Committee or with other private persons, which contacts were not associated with the fulfillment of a legislative function or duty, that area would appear to be political and subject to discovery under the normal rules, under the normal standards provided for in Federal Rule of Civil Procedure 26.

> . . . . The motion for protective order for Representative O'Donnell is granted in part and denied in part.

[J.S.App. 43-44].

The facts and events surrounding the issuance of this ruling deserve close scrutiny. It should be noted that Appellants filed no opposition to Appellee O'Donnell's motion for a protective order. In view of the time constraints imposed by the urgency of the matter, and the fact that the issue of legislative privilege had been raised well before O'Donnell's motion was filed, the court below would not permit an extension of time to file a memorandum in opposition to the motion [J.S.App. 20-21]. However, on at least three occasions during argument on the motion, the court invited Appellants to file a motion for reconsideration of the ruling [J.S.App. 21, 37, 46]. No such motion was ever filed by Appellants.[2] Furthermore, the court urged Appellants to submit a list of proposed questions to opposing counsel in advance of the O'Donnell deposition so that any disputes over the applicability of O'Donnell's legislative privilege could be resolved by the parties or by the court, if necessary [J.S.App. 45]. No such list was ever provided. The deposition of Appellee O'Donnell was held as ordered. Appellants made no application to the court for resolution of any dispute involving the applicability of the privilege. No further discovery was sought by the Appellants.

At the trial of the case, the three-judge panel acknowledged that it had affirmed the ruling of the single judge on the applicability of legislative privilege and requested Appellants' counsel to respect the ruling in conducting his direct examination of O'Donnell [J.S.App. 107]. The privilege was, in fact, asserted by and on be-

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2. At one point during argument, Appellants' counsel requested and was granted permission to file an answering memorandum on the Monday following the issuance of the ruling [J.S.App. 37]. No memorandum was ever filed.

half of O'Donnell on five occasions during the course of the hearing [J.S.App. 83, 108, 109, 122, 124]. However, on only one occasion did the court uphold the privilege as to a particular question [J.S.App. 124]. The questioning of O'Donnell was otherwise virtually unrestricted. In addition, Appellants were permitted to recall O'Donnell to the stand twice, following his initial testimony. Counsel for Appellants requested a blanket ruling on the general availability of legislative privilege, in advance of questioning, but the court declined to issue such a ruling, stating that the applicability of the privilege could only be determined on a question by question basis:

> Mr. Kaimowitz: My motion is to rule that Mr. O'Donnell has to testify to his knowledge of those conversations [with Democratic City Committee Chairman David Glancey] and what took place between him and Mr. Glancey concerning particularly the City of Philadelphia and the development of lines for the City of Philadelphia.
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> Judge Garth: I will not make Mr. O'Donnell testify to anything that would infringe his legislative immunity, but inasmuch as I cannot determine that, nor can the panel, in general but only on a question by question basis, you have the privilege of recalling Mr. O'Donnell if you so desire.

[J.S.App. 116]. To the extent that O'Donnell was questioned in the area delineated by Appellants' counsel, he answered without invoking his legislative privilege as to any particular question. Moreover, the court did not sustain an objection on that ground to any question in that area.

Appellees urge the Court to consider the applicable law against this background of facts.

To the extent that Appellants challenge O'Donnell's assertion of his legislative privilege in connection with his legislative functions, their arguments must fail. Appellants first argue that the issue of whether legislative

privilege may be invoked to bar the type of inquiry sought in this case has never been addressed by this Court. On the contrary, this Court has firmly established that legislative privilege may be invoked by state legislators. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court recognized that state legislators enjoy a legislative privilege, rooted in common law, regarding their legislative acts. Likewise, in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), this Court recognized the legislative privilege under federal common law in the context of a federal action against members of a state supreme court acting in a purely legislative capacity, where federal rights were asserted. Moreover, in that case, the Court also ruled that the common law legislative privilege is coextensive with the Speech or Debate Clause, U.S. Const.Art. I, §6. 446 U.S. at 732.

The breadth of the term "legislative act" was explored in *United States v. Brewster*, 408 U.S. 501 (1972). In that case, this Court dealt with the issue in the context of determining whether legislative privilege could operate to bar a federal criminal prosecution for bribery. The Court held that the privilege available under the Speech or Debate Clause protects legislators from inquiry into legislative acts or the motivation for performance of such acts, noting, however, that not all conduct *relating* to the legislative process was protected. 408 U.S. at 512. Activities such as constituent errands, the making of appointments, speeches and the like were held to be in this latter category of unprotected activity. Furthermore, the Court has sanctioned the invocation of legislative privilege by legislative aides who perform legislative acts on behalf of a legislator. *Gravel v. United States*, 408 U.S. 606, 616-617 (1972). Appellee O'Donnell is a state representative but functioned as well as an aide to Representative and Commission member Manderino during the reapportionment process [J.S.App. 109].

The Court's pronouncements in this area counsel initially that the legislative privilege is one which is deeply-rooted in our common-law jurisprudence. Its purpose is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. at 507. Secondly, the similarity between common law immunity and the Speech or Debate Clause permits evaluation of the issue before the Court in this case in the light of the Court's decisions construing the breadth of the federal constitutional privilege. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. at 732. Third, the view consistently espoused by this Court that legislative acts and motivations therefor are clearly covered by the privilege leads inescapably to one conclusion. That conclusion is that Appellee O'Donnell properly asserted the privilege with regard to questions concerning any reapportionment plans he may have drawn for the Commission.[3] Clearly, his contribution to the drawing of a reapportionment plan falls squarely within the definition of legislative act. The Legislative Reapportionment Commission was created for the purpose of enacting legislation, in the form of a reapportionment plan for the Commonwealth.[4] Furthermore, the privilege could have been asserted by O'Donnell to prevent any questioning as to other legislative acts he may have done or as to any motives therefor.

Appellants rely on *United States v. Gillock*, 445 U.S. 360 (1980) in support of their argument, but that reliance is misplaced. The issue before the court in that case was whether a state legislator could invoke a legislative privilege to bar introduction of evidence of his legislative acts in a federal criminal prosecution. The Court held that such a privilege could not be invoked in that

3. The only question to O'Donnell to which an objection of legislative privilege was sustained asked what reapportionment plans he drew for the House [J.S.App. 124].

4. Pa.Const., Art. II, §17.

context. The basis for the Court's holding was its belief that application of an evidentiary privilege for state legislators in the context of a federal criminal prosecution "would impair the legitimate interest of the Federal Government in enforcing its criminal statutes." 445 U.S. 369 at 373. This rationale has no applicability in this *civil* case, and *Gillock* is therefore inapposite.

Appellants next argue that the court below should have found that extraordinary circumstances in this case justified inquiry into the motives of the Legislative Reapportionment Commission and Representative O'Donnell, citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Appellants appear to be arguing that extraordinary circumstances within the meaning of *Arlington* are present in this case by virtue of certain allegedly discriminatory remarks and suggestions transmitted from Appellee Glancey to Appellee O'Donnell. However, the *Arlington* decision defines extraordinary instances as being those instances where "there is proof that a discriminatory purpose has been a motivating factor in the decision." 429 U.S. at 265-266. Here, there is no proof, only allegation, that the Commission was infected by discriminatory views advanced by Glancey. Furthermore, the facts show the opposite of what Appellants alleged in their pleadings. While the preliminary plan provided for no House district with a Hispanic population greater than fifteen percent of the total, the final plan provided for a district with a Hispanic population greater than forty percent. As the court below noted, in light of these facts:

> It is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that the Commission embraced the views of defendant Glancey.

[J.S.App. 16]. Appellants have thus failed to show the existence of extraordinary circumstances which might justify reliance on *Arlington*. In any event, Appellants themselves concede that in *Arlington*, this Court specifically acknowledged the availability of legislative privilege to bar the testimony of legislators concerning their motivations, even in the extraordinary instances in which legislators may be called [J.S. 21].

Appellants also argue, alternatively, that even if Appellee O'Donnell properly invoked his legislative privilege with regard to his purely legislative acts, the court below erroneously permitted him to do so with regard to acts done in his political capacity [J.S. 23].[5] They contend that O'Donnell's characterization of his actions during reapportionment considerations as legislative was not sufficient to cut off discovery for "all relevant information", or to warrant invocation of legislative privilege at trial. Appellees' recitation of the facts surrounding the issue of legislative privilege in this case demonstrate unequivocally that Appellants' own failure to seek information was the primary reason for their defeat in the court below. The protective order which was granted in part to Appellee O'Donnell was based on a ruling which specifically permitted questioning of him as to his purely private or political activities. Appellants fault the court below for its failure to ascertain and rule on "the parameters for discovery in light of the evidence before it" [J.S. 25]. Yet, the court specifically invited Appellants to offer suggested parameters for discovery, in advance of discovery, so that any dispute could be resolved by the court. Appellants failed to do so. Their uncertainty about the boundaries of the privilege is a direct result of their own failure to request the court's ruling on areas they

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5. Appellants contend initially that the Court required them to bear "the burden of showing why a protective order should not be granted" with respect to O'Donnell [J.S. 23]. Yet, the record is devoid of any suggestion that the court below shifted the burden under Rule 26 to Appellants.

wished to probe. Likewise, at trial, the panel allowed Appellants more than ample opportunity to explore O'Donnell's political acts, including virtually unlimited questioning of O'Donnell and even suggestions by the court as to appropriate questions to ask. Appellants may not blame the court for their failure to pursue the many opportunities made available to them for eliciting the information they sought.

CONCLUSION

Appellees the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell respectfully submit that the questions presented in this appeal are so insubstantial as not to need further argument, and appellees respectfully move the Court to affirm the judgment of the Three-Judge District Court in the Eastern District of Pennsylvania.

Respectfully submitted,

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